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In The

Supreme Court of the United States

October Term, 1976

No. 76-184

ALDO M. LOVISI AND MARGARET LOVISI,
Petitioners,

v.

A. E. SLAYTON, JR. AND LEAKE PARRISH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The respondents, A. E. Slayton, Jr., and Leake Parrish, respectfully pray that a Writ of Certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on May 12, 1976, not be granted.

OPINIONS BELOW

The judgment of the United States Court of Appeals sitting *en banc* is not as yet reported but it is set forth in full

in the Appendix to the Petition for a Writ of Certiorari at pages 1a. to 24a. The opinion of the United States District Court for the Eastern District of Virginia is reported at 363 F.Supp. 620 (E.D. Va. 1973), and may be found at pages 25a. to 49a. of the Appendix to the Petition. The prior decisions of the state courts are all unreported and may be similarly found in the Appendix, with the judgment of the Supreme Court of Virginia denying a writ of error located at pages 50a. to 51a. and the oral ruling of the trial court, the Circuit Court of Virginia Beach, is at page 52a.

JURISDICTION

Petitioners assert that the jurisdiction of this Court to issue the writ of certiorari is grounded in 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a state statute forbidding oral-genital contact between husband and wife is unconstitutional?

2. Whether the right of marital privacy is a right which in some circumstances can be voluntarily shared with a third person without automatically being "dissolved" as against intrusion by the state?

3. Whether a married couple who voluntarily invite an individual into their home thereby engage in "public" conduct and lose their right to "selectively" invoke their right of marital privacy against intrusion by the state?

STATEMENT OF THE CASE

Respondents herein will not refer to any of the facts developed during the prosecution of Margaret Lovisi for arson, or during the conviction of Aldo Lovisi for taking

indecent liberties with his two step-daughters. References will be made to the parties' joint conviction, to Margaret Lovisi's conviction for sodomy with Earl Romeo Dunn and to Aldo Lovisi's conviction under § 40-112 of the Code of Virginia as all of these proceedings are interrelated and the records in these proceedings were all before the District Court. The prosecuted acts in question all occurred around the end of March in 1969. Sometime prior to that date one Earl Romeo Dunn became acquainted with the Lovisis by means of a magazine titled "Swinger's Life," a magazine intended for persons interested in engaging in various unusual sexual activities and Dunn answered an ad in this magazine placed by the Lovisis. Dunn traveled to Virginia Beach from Washington, D. C. to meet with the Lovisis on three occasions, and on the third occasion the three individuals went to New York City for a trip with a return to Virginia Beach on March 30, 1969. The following day, on March 31st, Aldo and Margaret Lovisi and Earl Dunn engaged in numerous joint sexual acts in the bedroom of the Lovisi home in Virginia Beach including acts of sexual intercourse and the performance of fellatio by Margaret Lovisi on both her husband and Dunn.

The records of the various trials reveal that Polaroid photographs were taken of the acts in question although there was conflict in the evidence as to how the pictures were taken. Dunn testified in each of the trials that the pictures were taken with the assistance of a self-timing device on the camera and Margaret Lovisi testified in the prosecution of Aldo under § 40-112 to the same effect, as did Aldo Lovisi at the plenary hearing in the District Court. On the other hand, Margaret Lovisi's two daughters, the step-daughters of Aldo Lovisi, testified at each of the trials that they were actually present when the aberrational acts

were taking place and they had been directed by Aldo Lovisi to take the photographs with the Polaroid camera. At the time of petitioners' joint trial on September 22, 1970, Carolyn Acree was fourteen years old and Eugenia Acree was thirteen years old.

The acts in question came to light on April 18, 1969, when the Virginia Beach Police were requested to attend a meeting at the two girls' school because of a photograph brought to school by the girls. The photograph in question had been destroyed by a teacher but Eugenia and Carolyn indicated to a police officer that there were many more similar photographs at home and, pursuant to a search warrant, a number of these pictures were seized by police officers at the Lovisi home and the precipitating prosecutions ensued.

Aldo Mario Lovisi was convicted of sodomy with Margaret Lovisi in the Circuit Court of the City of Virginia Beach on January 22, 1971, and he was further convicted in the same court on April 6, 1971, of fondling Eugenia Acree and Carolyn Acree and sentenced to serve three years in the Virginia State Penitentiary on each of those convictions. He was additionally convicted in the Circuit Court of the City of Virginia Beach of a violation of § 40-112 of the Code of Virginia on August 7, 1970, and was sentenced to serve twelve (12) months in jail and pay a fine of $1,000. The last conviction referred to was subsequently reversed by the Supreme Court of Virginia in the case of *Lovisi* v. *Commonwealth*, 212 Va. 848, 188 S.E.2d 206 (1972) on the basis of an error in instructing the jury regarding the definition of a statutory term and the Commonwealth of Virginia determined not to re-try Aldo Lovisi on that charge. Margaret Lovisi was convicted in the Circuit Court of Virginia Beach of sodomy with

Aldo Lovisi on January 20, 1971, and sentenced to serve two years in the Virginia State Penitentiary and she was additionally convicted in the same Court of sodomy with Earl Romeo Dunn on September 11, 1970, and sentenced to serve a three year term in the Virginia State Penitentiary. She was also convicted of arson in the Circuit Court of Virginia Beach on a separate occasion.

Aldo and Margaret Lovisi sought Writs of Error from the Supreme Court of Virginia on their challenges to their sodomy convictions but that Court denied and refused Writs of Error by Orders entered on September 1, 1971, and November 3, 1971. Petitions for Writs of Certiorari were subsequently denied by this Court on March 20, 1972, and April 3, 1972, with Mr. Justice Douglas dissenting from the denial of certiorari in each of the cases.

A Petition for a Writ of Habeas Corpus was filed on behalf of both petitioners in the United States District Court for the Eastern District of Virginia, Richmond Division, on August 11, 1972, and by Order of the same date the respondents were directed to answer within 23 days. The respondents filed a timely Answer, as well as a Motion to transfer the Case to the United States District Court for the Eastern District of Virginia, Norfolk Division, and by Order of September 11, 1972, the Honorable Judge of the District Court solicited petitioners' response to respondents' Motion to Dismiss. By Order entered September 13, 1972, the Motion to Transfer the Action was overruled and various pleadings and memoranda were subsequently filed on behalf of the parties. By Order of April 26, 1973, the Court solicited additional memoranda with regard to the necessity for a plenary hearing and the taking of certain evidence and, over the objection of the respondents, by Order of June 4, 1973, a hearing was ordered and that hearing

was subsequently set for and held on July 27, 1973. After that hearing, the Order appealed from was entered on August 31, 1973 and this appeal ensued. By Memorandum of June 13, 1974, the matter was set down for full briefing and oral argument. Thereafter the Brief and Appendix for the appellants were filed, along with a Brief *amicus curiae* on behalf of the American Civil Liberties Union Foundation supporting the appellants.

The case was originally heard before a panel of the Court of Appeals on November 6, 1974, and it was subsequently rescheduled for argument before the Court of Appeals *en banc* without an opinion being rendered by the panel. Argument was heard by the court on November 11, 1975, and the decision complained of here was rendered on May 12, 1976.

ARGUMENT

Former Section 18.1-212, Code of Virginia, (1950), As Amended, Is Not Violative Of Any Recognized Constitutional Right To Privacy And The Acts Committed By Petitioners And Punished Under That Provision Of Virginia Law Similarly Are Without The Boundaries Of Any Zones Of Privacy Heretofore Protected By The Constitution. Even If The Statute In Question Were Theoretically Violative Of The Right To Privacy As To Some Acts Similar To Those Performed By Petitioners, These Petitioners Would Have No Standing To Attack The Statute On Those Grounds.

In recent years this Honorable Court has attempted to define the parameters and constitutional origins of a "right to privacy" in cases beginning with *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), proceeding through *Stanley* v. *Georgia,* 394 U.S. 557 (1969), *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), *Roe* v. *Wade,* 410 U.S. 113 (1973), *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973),

United States v. *12—200 Ft. Reels,* 413 U.S. 123 (1973), and *United States* v. *Orito,* 413 U.S. 139 (1973), and concluding for the present time with *Village of Belle Terre* v. *Boraas,* ..... U.S. ....., 94 S.Ct. 1536 (1974) (Note, "On Privacy: Constitutional Protection for Personal Liberty," 48 N.Y.U.L.Rev. 670 (1973); Note, "The Constitutional Right of Privacy: An Examination," 69 Nw.U.L.Rev. 263 (1974); Henkin, "Privacy and Autonomy," 74 Colum. L.Rev. 1410 (1974); Marshall, "The Right to Privacy: A Sceptical View," 21 McGill, L.J. 242 (1975)). These decisions have focused on the right to privacy as adhering to such fundamental personal rights such as marital privacy, the right to read selections of one's own choosing in his own home and the right to make such personal decisions as those involving procreation and the bearing of children. This Court has also seemed to place this infant "right of privacy" on the scales and balanced it with the "public good" so as to determine the extent to which the state may regulate activities which are essentially, and by their very nature, private. Justice Harlan, for example, in his seminal dissenting opinion on privacy in *Poe* v. *Ullman,* 367 U.S. 497 (1961), argued that the right to privacy would not affect "laws forbidding adultery, fornication and homosexual practices" despite their essentially private nature. (367 U.S. at 545-546). Justice Goldberg, in his concurring opinion in *Griswold,* acknowledged his intellectual debt to Harlan and noted that "it should be said of the Court's holding today that it in no way interferes with a state's proper regulation of sexual promiscuity or misconduct." (381 U.S. at 498-499; see also concurring opinion of Justice White, 381 U.S. at 505-507). A similar limitation on the breadth of the right to privacy was described by Chief Justice Burger in *Paris Adult Theatre I* when he stated that he was unwilling to adopt the argument that the "Constitution incorporates the

proposition that conduct involving consenting adults only is always beyond state regulation . . ." (413 U.S. at 68). Justice Douglas in *Village of Belle Terre* rejected an argument that the right to privacy was violated by a zoning ordinance restricting land use to single-family dwellings, and which defined as family so as to exclude more than two unrelated persons living together (94 S.Ct. at 1540). In sum, the right to privacy has thus far been defined in such a way so as to exclude the activities engaged in by petitioners here from a protected zone of privacy. See also *Doe* v. *Commonwealth's Attorney for the City of Richmond,* 96 S.Ct. 1489 (1976), involving this same statute.

Even assuming, *arguendo,* that the right to privacy encompasses sodomitic acts between a husband and wife within the marital domicile, the setting and cast of characters involved in the perverted tableau in this case would clearly constitute a waiver of the right as to petitioners. After *Griswold* many decisions limited the right to privacy in sexual matters to marital privacy (See, e.g., *Cotner* v. *Henry,* 394 F.2d 873 (7th Cir. 1968); *State* v. *Lutz,* 57 N.J. 314, 272 A.2d 753 (1971); *State* v. *Clark,* 58 N.J. 72, 275 A.2d 137 (1971)). However, the subsequent decision of this Court in *Eisenstadt* v. *Baird, supra,* extending *Griswold* to unmarried persons on equal protection grounds, necessitated a broader application of the right. Courts have increasingly focused on whether the sex offense in question was indeed "private" or whether acts were committed in a "public" setting. In *People* v. *Drolet,* 30 Cal. App. 3d 207, 105 Cal. Rptr. 824 (1973), the California Appellate Court affirmed a conviction for oral copulation where the acts in question were committed on the stage of a nightclub despite a contention that the statute was unconstitutional as applied to consenting adults. The same court upheld an identical conviction where the offense was committed during the production of a motion picture in *People* v. *Parker,* 33 Cal. App. 3d 842, 109 Cal. Rptr. 354 (1973), even though the filming took place in a semi-public place. Similarly, in *Harris* v. *United States,* 315 A.2d 569 (D.C.Ct.App. 1974), the Court upheld a conviction based on homosexual activity in a health club by concentrating on the public nature of the club rather than on the nature of the activities themselves. This was largely the approach of the Court below although the Court dealt with the issue in the context of standing. *It is hard for these petitioners to claim a right to privacy as to acts committed in the admitted presence of a third party before the acknowledged lens of a camera and in the alleged presence of the two daughters of the couple.* (See *Raphael* v. *Hogan,* 305 F.Supp. 749 (S.D.N.Y. 1969).

It is likewise clear that the petitioners herein have no standing to assert the alleged constitutional rights of others (*United States* v. *Raines,* 362 U.S. 17 (1960); *Tileston* v. *Ullman,* 318 U.S. 44 (1943); *Adams* v. *Askew,* 511 F.2d 700, 704 (5th Cir. 1975); *Gajon Bar & Grill, Inc.* v. *Kelley,* 508 F.2d 1317, 1322 (2d Cir. 1974); *Paulos* v. *Brier,* 507 F.2d 1383, 1386-1387 (7th Cir. 1974); *Bell* v. *Horgisto,* 501 F.2d 346, 356 (9th Cir. 1974); *Corey* v. *City of Dallas,* 492 F.2d 496, 497-498 (5th Cir. 1974); *U.S.* v. *Lippman,* 492 F.2d 314, 316-317 (6th Cir. 1974); *O'Malley* v. *Brierley,* 477 F.2d 785, 789 (3d Cir. 1973); *Lellum* v. *Cupp,* 475 F.2d 829, 831 (9th Cir. 1973); *United States* v. *Brewer,* 363 F.Supp. 606 (M.D.Pa. 1973); see also dissent of Justice Brennan in *Village of Belle Terre* v. *Boraas, supra,* 94 S.Ct. at 1541-1542).

The petitioners' earlier reliance on *State* v. *Elliott,* 88 N.M. 187, 539 P.2d 207 (1975) and *Ravin* v. *State,* 537 P.2d 494 (Alaska 1975), cannot afford them much solace in their argument in this case. Initially, it should be pointed out

that the decision in the *Elliott* case was by an intermediate appellate court and certiorari was granted to that decision by the Supreme Court of New Mexico on August 11, 1975. The New Mexico court's analysis of the standing issue in *Elliott* leaves much to be desired as the court dismissed the rule in *United States* v. *Raines, supra,* as a "judicial *rule of practice,* which, although weightly, is not inviolable . . ." (539 P.2d at 211). Unlike the New Mexico Court this Honorable Court cannot so facilely dismiss the conclusion of *Raines* as a "rule of practice." The *Ravin* decision, similarly, was not decided on the basis of a federal constitutional right to privacy but instead was predicated on the right to privacy amendment to the Alaska Constitution. In addition, the petitioners' analysis of the ambit of the right to privacy so as to cover any acts committed in the home could lead to an absurd conclusion. The marital home does not give a license or shield against prosecution to any criminal acts committed therein.

Finally, there is the question of whether Petitioners waived their right to privacy, if such existed, by the nature of their acts? Petitioners consistently protest the application of a doctrine of "waiver" in the absence of any informed action. Perhaps it is semantics that has caused the problem with regard to this issue. Perhaps it would be better to characterize the issue as being one as to whether petitioners had any *reasonable expectation of privacy* as to the acts they committed in light of the admitted and invited presence of Earl Romeo Dunn and in further light of their admitted and intentional photographing of their acts whether by the children or by the use of a timing device (cf. *Katz* v. *United States,* 389 U.S. 347, 351-352 (1967)). It is respectfully submitted that no such reasonable expectation of privacy existed here.

There are obviously difficult cases that could arise in the context of the private marital relationship regarding the criminal laws regulating sexual behavior and particularly the sodomy laws, but this simply is not one of those hard cases. To attempt to characterize it as such is to create analytical problems that could either sweep too broadly or define too narrowly the scope of rights that would apply in cases with legitimate problems.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on or before the 28th day of October, 1976, three copies each of the foregoing Brief for the Respondents in Opposition to the Granting of a Petition for a Writ of Certiorari were mailed to Melvin L. Wulf, Esquire, and Joel M. Gora, Esquire, American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016 and to Richard Edelin Crouch, Esquire, 2304 Wilson Boulevard, Arlington, Virginia 22201, counsel of record for Petitioners.

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